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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 242

UTICA MUTUAL INSURANCE COMPANY, PETITIONER

v.

MERLE D. VINCENT, JR., REGIONAL DIRECTOR OF THE THIRD REGION OF THE NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 221 Misc.

UTICA MUTUAL INSURANCE COMPANY, PETITIONER

v.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK, AND THE HONORABLE STEPHEN W. BRENNAN, SENIOR JUDGE OF SAID DISTRICT COURT

ON MOTION FOR LEAVE TO FILE A PETITION FOR WRIT OF MANDAMUS

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A 1–10) is not yet officially reported. The memorandum

decision and order of the district court (Pet. App. B 1–6) are unreported.

JURISDICTION

The decision and judgment of the court of appeals were entered on March 14, 1967 (Pet. App. A 1, A 11). The petition for a writ of certiorari (No. 242), and the motion for leave to file a petition for writ of mandamus (No. 221 Misc.) were filed on June 12, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) (certiorari) and 28 U.S.C. 1651(a) (mandamus).

QUESTIONS PRESENTED

1. Whether Section 9(c)(1) of the National Labor Relations Act violates the due process clause of the Fifth Amendment to the Federal Constitution because it precludes the hearing officer in a representation investigation from making a recommendation or indicating his opinion on questions of credibility.

2. Whether the district court properly dismissed the complaint without convening a three-judge district court pursuant to 28 U.S.C. 2282.

STATUTES AND OTHER PROVISIONS INVOLVED

The relevant statutes and constitutional provision are set forth at Pet. App. C 1–3.

STATEMENT

On about June 10, 1964, Communications Workers of America, AFL–CIO ("the Union") filed a petition with the Regional Director of the Board seeking certification as the exclusive bargaining representative

for a unit of petitioner's employees at its main office in New Hartford, New York. Following an investigation, the Regional Director served a Notice of Representation Hearing upon petitioner pursuant to Section 9(c)(1) of the Act (Pet. App. C 1-2). On July 8, 1966, the hearing commenced before a hearing officer appointed by the Regional Director (J.A. 3, 9).[1]

On the same day, petitioner filed a complaint in the United States District Court for the Northern District of New York, alleging that the provision in Section 9(c)(1), which prohibits the hearing officer in a representation hearing from making recommendations to the Board,[2] deprived petitioner "of its valuable property rights to a full and fair hearing on the matter of 'an appropriate bargaining unit' " in violation of the due process clause of the Fifth Amendment (J.A. 6). The complaint sought a preliminary injunction restraining the Regional Director from continuing the representation hearing and a declaration that the hearing deprived petitioner of constitutional rights (J.A. 7). Petitioner also requested a hearing before a three-judge district court under 28

[1] "J.A." refers to the portions of the record printed in the joint appendix filed in the court of appeals.

[2] Section 9(c)(1) provides, in relevant part, that:

"* * * the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

U.S.C. 2282 (J.A. 17). On July 13, 1966, the Regional Director filed an opposition to the request for a three-judge court, and moved to dismiss the complaint (J.A. 8). Following oral argument, the district court held that petitioner's contention was too insubstantial to warrant convening a three-judge court, and dismissed the complaint (Pet. B 1–6).

The Court of Appeals for the Second Circuit affirmed. The court agreed that petitioner's constitutional claim was too insubstantial to require a three-judge court, and that the complaint was properly dismissed. (Pet. A 1–9.)

ARGUMENT

1. The courts below correctly rejected petitioner's contention that Section 9(c)(1) of the Act offends the due process clause of the Fifth Amendment because it precludes the hearing officer in a representation case from making a recommendation or issuing a report concerning his assessment of the credibility of witnesses.[3]

In *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 350–351, and *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, 226, 229, this Court upheld the procedure in unfair labor practice cases, which then existed under the Wagner Act, whereby trial examiners received testimony and transferred the cases directly to the Board without tentative reports or findings. The

[3] It should be noted that the procedure of which petitioner complains is prescribed by statute and not merely a rule promulgated by the Board. Compare *Greene* v. *McElroy*, 360 U.S. 474, with *Hannah* v. *Larche*, 363 U.S. 420.

Board's scrutiny of the record and briefs was deemed sufficient to fulfill the due process requirements of the Constitution. As the Court stated in *Mackay* (304 U.S. at 351): "The Fifth Amendment guarantees no particular form of procedure; it protects substantial rights. Compare *Morgan* v. *United States*, 298 U.S. 468, 478." See also Pet. App. A–4, n. 3.

Morgan v. *United States*, 298 U.S. 468 (*Morgan I*), relied on by petitioner (Pet. 7–8), actually supports the Board's position. There, the Court, as in the subsequent cases cited above, eschewed any requirement that a hearing officer make a report on the evidence, stating, "while it would have been good practice to have the examiner prepare a report and submit it to the Secretary and the parties * * * we cannot say that that particular type of procedure was essential to the validity of the hearing" (*id.*, at 478; see also *Morgan* v. *United States*, 304 U.S. 1, 21). Nor did the Court in *Morgan I* lay down any requirement that deciding officers must actually see or hear the witnesses testify. Indeed it sanctioned the use of examiners and subordinates for this purpose. See 298 U.S. at 481. See 2 Davis, *Administrative Law Treatise*, § 11.02 (1958).

Moreover, the nature of representation proceedings is such that they do not require the "full panoply of procedural protections." *Brotherhood of Railway Clerks* v. *Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, 667. In *Hannah* v. *Larche*, 363 U.S. 420, 440, 442, rehearing denied, 364 U.S. 855, this Court recognized that "the requirements of due process * * * vary with the type of proceeding involved. * * * Whether the Constitution requires that

a particular right obtain in a specific proceeding depends upon * * * [t]he nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding." As this Court noted in *Inland Empire District Council* v. *Millis*, 325 U.S. 697, 706, a representation proceeding is "not technical. It is an 'investigation,' essentially informal, not adversary. The investigation is not required to take any particular form or confined to the hearing." See also, *Foreman & Clark, Inc.* v. *National Labor Relations Board*, 215 F. 2d 396, 408 (C.A. 9), certiorari denied, 348 U.S. 887; *National Labor Relations Board* v. *Fresh'nd-Aire Co.*, 226 F. 2d 737, 740–741 (C.A. 7); *National Labor Relations Board* v. *Botany Worsted Mills*, 133 F. 2d 876, 882 (C.A. 3).[4] As Judge Friendly pointed out in his opinion below (Pet. App. A 9): "There is much reason why a representation hearing should not have to be of the trial type. What is likely to be the prime issue, 'whether * * * the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof,' * * * is more nearly 'legislative' than 'adjudicative' * * *."[5]

[4] In recognition of the informal, investigatory nature of representation proceedings, those proceedings are specifically exempted from the formal hearing requirements of the Administrative Procedure Act (see 5 U.S.C. 1004(c)), including the requirement which calls for a hearing officer's report except where "due and timely execution of [the agency's] functions" requires otherwise (5 U.S.C. 1007(a)).

[5] To the extent that questions of credibility are involved in a representation proceeding, they are most likely to arise, not in the pre-election hearing which, as noted above, is primarily

Petitioner's assertion that there is a conflict in the circuits concerning the necessity of having the hearing officer pass on the issues of credibility is incorrect. Petitioner relies on *S. Buchsbaum & Co.* v. *Federal Trade Commission*, 153 F 2d 85, as being in conflict with the decision below. However, the Seventh Circuit's judgment in *Buchsbaum* was vacated by this Court on the filing of a waiver of error. 328 U.S. 818. Thus, that opinion has no precedential value and cannot give rise to a conflict. Moreover, the *Buchsbaum* case involved an administrative proceeding which resulted in a cease-and-desist order that had an immediate and direct impact upon the company, whereas the present proceeding involves merely the certification of a bargaining representative—a preliminary step in the effectuation of an employer's statutory duty to bargain.

2. Since the constitutional issue which petitioner raised was plainly insubstantial, the refusal to convene a three-judge district court pursuant to 28 U.S.C. 2282 was proper. See *Ex parte Poresky*, 290 U.S. 30; *California Water Service Co.* v. *City of*

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concerned with determining the appropriate bargaining unit, but in the post-election investigation of objections which may have been filed to the election. The Board's rules provide for a post-election hearing, together with a "report resolving questions of credibility," where the objections raise "substantial and material factual issues." Rules and Regulations of the National Labor Relations Board, Series 8, as amended, 29 C.F.R. Sec. 102.69 (c), (d), and (e). See, in addition to the cases cited by petitioner (Pet. 11), *National Labor Relations Board* v. *O.K. Van Storage Inc.*, 297 F. 2d 74, 76 (C.A. 5); *Rockwell Mfg. Co.* v. *National Labor Relations Board*, 330 F. 2d 795 (C.A. 7), certiorari denied, 379 U.S. 890.

Redding, 304 U.S. 252, 254–255; and other cases cited by the court of appeals (Pet. App. A 2–3).

CONCLUSION

The petition for a writ of certiorari, and the alternative motion for leave to file a petition for a writ of mandamus, should both be denied.*

Respectfully submitted,

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JULY 1967.

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*Apart from the considerations already advanced, the extraordinary writ of mandamus would be inappropriate for the additional reason that petitioner may utilize the normal procedure for review by certiorari—as it is doing.

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